Supreme Court, U.S.
FILED
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No. 97-155

In The

Supreme Court of the United States

October Term, 1996

FLORIDA SEED COMPANY, INC., *et al.*,

Petitioners,

vs.

MONSANTO COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a distributor whose contract is not renewed following the acquisition of its supplier lacks standing under the antitrust laws because it has not suffered antitrust injury.

PARTIES TO THE PROCEEDING BELOW

Respondent incorporates by reference Petitioners' list of parties to the proceeding below.

RULE 29.6 LIST

Monsanto Company has no parent company. Its non-wholly owned subsidiaries are:

3128156 Canada Inc. (D/B/A Flexsys Company)
Advanced Elastomer Systems Hong Kong Limited
Advanced Elastomer Systems Japan Limited
Advanced Elastomer Systems Limited
Advanced Elastomer Systems Marketing Pte. Ltd.
Advanced Elastomer Systems NV/SA
Advanced Elastomer Systems Singapore PTE. Ltd.
Advanced Elastomer Systems, Canada, Inc.
Advanced Elastomer Systems, Inc.
Advanced Elastomer Systems, L.P.
Alginate Industries Limited
Alginate Industries (Ireland) Limited
Alginate Industries (Scotland) Limited
Arramara Teoranta
Complejo Asgrow Semillas, S.A.
D & M International, L.L.C.
Deutsche Advanced Elastomer Systems Gmbh
Flexsys Additive Fur Die Kautschuk Industrie Gmbh & Co. Kg
Flexsys Additive Fur Die Kautschuk Industrie Verwaltungs Und Beteiligungs Gmbh
Flexsys America Co.
Flexsys America L.P.
Flexsys A. B.
Flexsys Holding B. V.
Flexsys Industria e Comercio Ltda.

RULE 29.6 LIST (Continued)

Flexsys N. V.
Flexsys Rubber Chemicals S. L.
Flexsys R. V.
Flexsys S.P.A.
Flexsys (Pte.) Ltd.
Fosbrasil S.A.
Hebei Ji Dai Cotton Seed Technology Company, Ltd.
Hybritech Europe Snc
Kelco Biospecialties Limited
Kelco Company
Kelco International Gmbh
Kelco International Limited
Kelco International Pension Fund Trust Limited
Kelco Specialty Colloids (S) Pte. Ltd.
Kelp Industries Pty. Limited
Korag Company Limited
Kumho Monsanto Inc.
Monsanto Agricola De Nicaragua
Monsanto Chemical Company Limited, Suzhou
Monsanto Chemicals Of India Limited
Monsanto (Malaysia) Sendirian Berhad
Monsoy S/A
Montor Performance Plastics Co.
PT Monfori Nusantara
Quimica M S.A. De C.V.
Rubiatec Sendirian Berhad
Thailon Six Six Limited
The NutraSweet Company
The WellBridge Company
Zooagro De Venezuela, C.A.

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No. 97-0155

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

FLORIDA SEED COMPANY INC., *et al.*,
Petitioners,

v.

MONSANTO COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent Monsanto Company respectfully opposes the Petition for Writ of Certiorari. This case presents a recurring fact pattern -- a distributor that has lost a line of goods following a merger of its supplier and claims standing to challenge the merger under the antitrust laws. The Eleventh Circuit resolved that issue in a decision that is consistent both with every one of the numerous courts that have previously addressed the question and with the precedent of this Court. Accordingly, no question worthy of *certiorari* is presented.

OPINIONS BELOW

Respondent incorporates by reference Petitioners' statement of opinions and judgments below.

JURISDICTION

Respondent incorporates by reference Petitioners' statement of jurisdiction.

STATEMENT OF THE CASE

A. *Factual Background*

This case arises out of Respondent Monsanto Company's acquisition of the Ortho Lawn and Garden business from Chevron Corporation. After the Federal Trade Commission permitted the acquisition to proceed (as described below), Monsanto undertook a review of Ortho's distribution agreements and made a "strategic decision to use fewer distributors." R1-1-15[1]. As a result of the review, Monsanto elected not to renew the distribution agreement of Petitioner Florida Seed, a wholesale distributor of lawn and garden products. *Id.* Thereafter Florida Seed sued, alleging that the acquisition was a "but for" cause of the loss of its distributorship and challenging both the Ortho acquisition and Monsanto's non-renewal of the distribution contract as violative of the Clayton Act and the Sherman Act. R1-1-20.

As noted, Monsanto's acquisition of Ortho was reviewed by the Federal Trade Commission pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390 (1976) (codified as amended at 15 U.S.C. § 18a (1994)). R1-1-6-8. Although Ortho markets some 200 lawn and garden products, the FTC perceived competitive issues as to only one Ortho product, a nonselective herbicide called Kleenup. R1-1-7. *See also In re Monsanto Co.*, 58 Fed. Reg. 30060 (1993) ("Consent

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[1] Citations to the record refer to the volume, the document (tab) number and the page of the record maintained by the district court clerk's office. Thus, R1-1-15 is volume 1, tab 1, p. 15. All citations to R1-1 are to Petitioners' Complaint.

Decree"). Kleenup is based on a patented active ingredient, glyphosate, that Ortho purchased from Monsanto. R1-1-3, 7. Monsanto uses the same active ingredient in its product, Roundup. *Id.*

Without admitting a violation of law, Monsanto entered into a consent decree with the FTC agreeing to divest to a suitable purchaser the trademark "Kleenup" and to sell a significant volume of the active ingredient (plus manufacturing know-how and certain regulatory approvals and filings) on a time schedule acceptable to the FTC.[2] R1-1-7. The Consent Decree contained no "hold separate" provision. Rather, Monsanto was free to control the Kleenup assets -- including *inter alia* the price and marketing of Kleenup -- as long as it maintained the "viability and marketability" of the assets to be divested. R1-1-7. The district court properly took judicial notice of the fact that, after Plaintiffs' Complaint was filed, Monsanto complied with the Consent Decree's divestiture requirement by selling the "Kleenup assets" to Platte Chemical Company, a subsidiary of ConAgra, Inc. (13a). ConAgra is a Fortune 500 company with 1996 revenue in excess of $24 billion.

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[2] In agreeing to the consent decree, Monsanto made clear that it did not admit that its acquisition of the Ortho business would offend the antitrust laws. *See* 58 Fed. Reg. 30,060, 30,061 (1993). Indeed, absent a settlement, the FTC would have faced a formidable task in explaining how the acquisition enhanced Monsanto's market power given that Monsanto's patent on glyphosate, the active ingredient in Kleenup, extended through the year 2000 (R1-1-5), while Ortho's contract to buy glyphosate ran only through September 30, 1994. In other words, there is no reason to believe that Monsanto had not, via its glyphosate supply contract, already reaped any economic power that inhered in the glyphosate patent through September 30, 1994, and no reason to believe that, if the acquisition had not gone forward, Ortho Kleenup would have been a viable competitor after that date. Rather, by not executing a new glyphosate supply contract, Monsanto would have put Ortho in the mode of winding up its Kleenup business starting no later than October 1994. In other words, the FTC consent did more than retain the status quo; it in fact enhanced competition for residential nonselective herbicides.

Monsanto's decision not to renew Florida Seed's Ortho distribution contract applied to all 200 products in the Ortho line, not just the Kleenup product Monsanto was required to divest. Petitioners nonetheless claim that Monsanto's refusal to renew Florida Seed's distributorship was part of a scheme to frustrate the divestiture agreed to in the Consent Decree. R1-1-19. Petitioners, however, allege only injury to themselves. R1-1-18. The Complaint contains no allegation that the Ortho acquisition or the non-renewal of Florida Seed's contract resulted in higher prices for consumers or reduced output. Specifically, there is not, and could not be, any allegation that retailers have been unable to obtain Kleenup from distributors other than Florida Seed.

B. *The Proceedings Below*

In early 1994 Respondent made demand on Florida Seed's sole shareholder, Petitioner Frit Industries ("Frit"), for money due and owing on a guaranty Frit had issued for all indebtedness owed by Florida Seed. R1-1-16. In response to Monsanto's demand for payment, on May 2, 1994, Petitioners filed this action against Monsanto in the United States District Court for the Middle District of Alabama. Petitioners asserted violations of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1994), Section 7 of the Clayton Act, 15 U.S.C. § 18 (1994), and state law claims. R1-1. *Florida Seed Co., Inc. and Frit Indus., Inc. v. Monsanto Co.* (No. 94-D-514-N). R1-1

Monsanto responded to the Complaint by counterclaiming for the $2,600,000 owed by Florida Seed on an open account and guaranteed by Frit. Monsanto at the same time moved to dismiss Petitioners' federal antitrust claims on grounds that they lacked standing to assert such claims. R1-5. On November 9, 1995, Judge Ira DeMent issued a Memorandum and Order granting Monsanto's Motion to Dismiss. (Pet. App. B). The court held both that Petitioners had not alleged antitrust injury and that any injury they suffered was "too remote" for them to be granted standing. (22a). Indeed, the district court noted that, "after

carefully examining the law" it "cannot find any cases, nor have plaintiffs cited any, that would warrant a contrary finding." *Id.*

At Petitioners' request, the district court entered a partial final judgment pursuant to Fed. R. Civ. P. 54(b) against Petitioners on their antitrust claims, permitting an immediate appeal. R1-30. After briefing and oral argument, on February 8, 1997 Judge Tjoflat wrote for a unanimous panel of the United States Court of Appeals for the Eleventh Circuit affirming the district court opinion. (Pet. App. A). The court of appeals recognized that, consistent with this Court's precedent, "courts have consistently denied standing to distributors who were terminated, or whose contracts were not renewed, following a merger." (6a). Because neither Florida Seed nor Frit had suffered antitrust injury, the court did not address whether either would be an efficient enforcer of the antitrust laws. (7a). In its conclusion, the court of appeals dismissed Petitioners' antitrust action as "a mundane commercial case, in which a buyer has used the antitrust laws to postpone paying its debts." (8a).

Petitioners filed a Petition for Rehearing and Suggestion of Rehearing *En Banc* on March 11, 1997, which was denied on April 24, 1997. No judge in regular active service on the Eleventh Circuit requested that the Court be polled regarding rehearing *en banc*. (Pet. App. C).

REASONS FOR DENYING THE WRIT

None of the "compelling reasons" that this Court has required for *certiorari* are present in this case. S.Ct. Rule 10. Rather, this case presents a recurring fact pattern: a distributor is terminated (or not renewed) when its supplier is acquired by a competitor. Each of the numerous decisions addressing these circumstances has reached the same result as the court below: the disgruntled former distributor has no standing under the antitrust laws to attack the acquisition or the non-renewal that follows it.

Petitioners' response to the uniformity of this case law is citation to, and out of context quotation from, cases that do not involve distributor terminations (or non-renewal) following a merger, cases unrelated to the "antitrust injury" inquiry, and cases involving alleged conspiracies in violation of the antitrust laws rather than the unilateral conduct alleged here. Nor can Petitioners rely on what they characterize as Monsanto's "temporary control of a competing brand" based on the requirements of the FTC consent decree to distinguish those cases finding no standing. Any abuse of the so-called "temporary control" of Kleenup is less an intrusion on competition than the permanent control of market power alleged in a typical merger case, where the case law uniformly concludes that former distributors lack standing. Moreover, the decisions of this Court and the lower courts make clear that only the FTC would have standing to challenge Monsanto's conduct if it violated the decree.

I. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS OR CONFLICT WITH THE DECISIONS OF THIS COURT.

A. Every Court To Address The Issue Has Held That Distributors Terminated After A Merger Have Not Suffered Antitrust Injury.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977), this Court recognized that:

> Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects.

Plaintiffs who allege injury from the "economic readjustments" which result from a merger, rather than "injury of the type that the antitrust laws were intended to

prevent and that flows from that which makes the defendants' acts unlawful," have not suffered "antitrust injury" and may not sue under the antitrust laws. *Id.* at 489. *See also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 345 (1990) (denying standing where injury was not caused by the "anticompetitive effects" of the challenged conduct).

The antitrust injury inquiry serves a vital gatekeeper role by protecting both defendants and the courts against parties who are not "seeking to vindicate the public interest as a private attorney general at all, but to obstruct competition . . . ." Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 334.2 at 409 (1993 Supp.). While this Court has not directly addressed the question of the standing of a former distributor to attack an acquisition and its aftermath, the Second, Fifth, and Ninth Circuits, numerous district courts, and the leading antitrust commentators all agree with the Eleventh Circuit that such distributors lack standing to sue under the antitrust laws. Former distributors have not suffered antitrust injury because they are not "seeking to vindicate the public interest," but only their own.[3]

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[3] Petitioner Frit Industries is not a distributor itself, but only the sole shareholder of a distributor -- Petitioner Florida Seed. Although Frit is identified as a party "whose judgment is sought to be reviewed," S.Ct. Rule 14.1(b), the Petition does not argue that the Court of Appeals erred in affirming dismissal of Frit's claims on the grounds that the Complaint alleges injury only to Florida Seed, rather than direct injury to itself. Because the question presented explicitly addresses only distributors (such as Florida Seed), not their shareholders, Respondent assumes that Petitioners are not seeking reversal of the dismissal of Frit's claims. Monsanto nonetheless notes that the courts are unanimous that shareholders, even sole shareholders like Frit, lack standing under the antitrust laws to sue for damage to their corporations. *See, e.g., Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1375 (9th Cir. 1996), *cert. denied* 117 S.Ct 1252 (1997); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 766 (2nd Cir.), *cert. denied*, 116 S.Ct. 381 (1995), *Lovett v. General Motors Corp.*, 975 F.2d 518 (8th Cir. 1992), *rev'd in part on other grounds*, 998 F.2d 575 (8th Cir. 1993); *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1378 (7th

In *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977), the leading case on this topic, defendant Olympia Brewing acquired Hamm's Brewing and terminated Hamm's distributors, including the plaintiff, Lenore. The Ninth Circuit rejected on standing grounds Lenore's argument that the acquisition violated Section 7 of the Clayton Act and that its termination constituted an attempt to monopolize under Section 2 of the Sherman Act:

> Even though Lenore's injury may have " . . . occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful." [citing *Brunswick*, 429 U.S. at 489.] The terminations were an incidental matter which the merger may have made possible, but certainly did not cause.

550 F.2d at 500. *Accord Sierra Wine & Liquor Co. v. Heublein, Inc.*, 626 F.2d 129 (9th Cir. 1980) (same). The Second Circuit recently reached the same result in *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762 (2d Cir.), *cert. denied*, 116 S.Ct. 381 (1995), denying standing to distributors asserting monopolization claims based on their termination after an acquisition they alleged to be illegal.[4]

Cir. 1987); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2nd Cir. 1986); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710 (11th Cir. 1984); *Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183, 1186 (10th Cir. 1983); *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 294 n. 2 (6th Cir. 1983); *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1115 (3d Cir. 1973); *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957). *See also Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910), *cited with approval in Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983).

[4] One of the questions presented in the *GKA Beverage* Petition for Writ of Certiorari denied by this Court was essentially identical to the question presented by Petitioners here: "Do exclusive distributors of soft drinks with a vested interest in the brands made by the bottler and who were also one of the two targets of the anticompetitive conduct, suffer sufficient

The Eleventh Circuit's decision below also follows Fifth Circuit precedent denying standing to a distributor terminated after a merger it alleged to be illegal. *Universal Brands, Inc. v. Philip Morris, Inc.*, 546 F.2d 30, 34-35 (5th Cir. 1977) (same).

As noted, *every* district court to address the question presented here has found no standing to sue under the antitrust laws as well. *See Return on Inv. Sys. v. TransLogic Corp.*, 702 F. Supp. 677, 679 (N.D. Ill. 1988) (§ 2 and § 7 claims of distributor terminated after acquisition); *Bryant Heating & Air Conditioning Corp. v. Carrier Corp.*, 597 F. Supp. 1045, 1051-53 (S.D. Fla. 1984) (same); *Tim W. Koerner & Assocs. v. Aspen Labs, Inc.*, 492 F. Supp. 294, 301 (S.D. Tex. 1980) (same), *aff'd*, 683 F.2d 416 (5th Cir. 1982) (table); *Fisher v. Coca-Cola Bottling Co. of Los Angeles*, 1979-1 Trade Cas. ¶ 62,514 (C.D. Cal. 1979) (same); *A.G.S. Elecs., Ltd. v. B.S.R. (U.S.A.), Ltd.*, 460 F. Supp. 707, 708 (S.D.N.Y.) (same), *aff'd*, 591 F.2d 1329 (2d Cir. 1978) (table); *Kirihara v. Bendix Corp.*, 306 F. Supp. 72, 90-91 (D. Haw. 1969) (same). Thus, there is not only no split among the circuits on the Question Presented in the Petition, there is no split among the district courts either. Rather, as noted in *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 43 (1st Cir. 1995), although there is no "black letter" rule for antitrust standing, "there are patterns in the antitrust standing cases that offer considerable guidance," and former distributor standing is one of those settled factual patterns.

Given the unanimity of precedent, it is unsurprising that the leading antitrust commentators agree that terminated distributors lack standing. Professors Areeda and Hovenkamp note in their treatise:

> Many mergers have been challenged by suppliers (including dealers, franchisees, and employees

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direct antitrust injury such that they have standing to assert a violation of the antitrust laws."

> providing the merging firms with distribution and other services) displaced as the result of the merger. Injury-in-fact may be doubtful when equivalent opportunities are available elsewhere. If other opportunities do not exist, *displaced suppliers made redundant by a merger suffer actual losses but not antitrust injury, for the rationale for condemning a merger lies in its potential for supracompetitive pricing, not in its potential for cost savings and other efficiencies.* A merger that actually brings about supracompetitive prices and diminished output reduces the need for inputs and can therefore injure suppliers. Although such an injury connects more closely with the rationale for finding a violation, it is still not antitrust injury because it is neither the means by which output is restricted nor the direct concern of antitrust rules protecting product market competition.

II Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 381a (rev. ed. 1995) (emphasis added).

B. The Cases Uniformly Holding That Distributors Terminated After A Merger Have Not Suffered Antitrust Injury Are Consistent With This Court's Precedent.

None of the former distributor standing cases cited above has even considered the possibility that precedent from this Court required a contrary result. This uniform view is clearly correct. This Court has never suggested that injury to distributors following a merger is "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. Rather, the vice of both mergers and monopolization is higher prices and reduced output. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 n.13

(1990). *Accord* Areeda & Hovenkamp, *supra*. Here, Petitioners complain not about such high prices or reduced output -- indeed their Complaint is silent regarding the existence of these effects -- but the loss of their distributorship contract. Accordingly, Petitioners are not complaining of antitrust injury.

Petitioners' invocation of *Associated Gen. Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) is misplaced. First, none of those cases deal with the Question Presented or even with the issue of terminated distributors. But more fundamentally, the cases are inapposite because they focus primarily on the question of whether a plaintiff who *has* suffered antitrust injury should nevertheless be denied standing because its injury is too indirect, speculative, or remote, or because of the possibility of duplicative recovery. They are of no relevance to Petitioners, who have *not* suffered antitrust injury.[5]

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[5] Petitioners cite *McCready* for the proposition that they have suffered antitrust injury because harm to Florida Seed was "a necessary step in effecting the ends of the illegal conspiracy." Pet. at 11 (citing *McCready*, 457 U.S. at 479). But it was *not* necessary to injure Florida Seed to have exactly the same alleged effect on the market; the same effect could be achieved without injury to Petitioners had Monsanto provided Florida Seed with Roundup rather than Kleenup to distribute. Conversely, Monsanto could have injured Florida Seed but avoided any antitrust concern by terminating Florida Seed and replacing it with a new, vigorous competitor. (Indeed, there is no allegation that Monsanto did not do just that.) *Cf. SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995) (even if antitrust laws imposed on the defendant a duty to promote competition, it need not do so utilizing the services of the plaintiff; plaintiff lacked standing because the defendant could simply have used other suppliers without violating the antitrust laws).

C. The Cases Cited By Petitioners To Show A Split Among The Circuits Or That The Decision Below Contradicts The Eleventh Circuit's Own Precedent Are Inapposite.

The cases cited by Petitioners for the proposition that there is a split among the circuits or that the Eleventh Circuit ignored its own precedent all involve facts quite different from those alleged by the Petitioners. Petitioners' argument that they have standing because of Monsanto's alleged "collateral anticompetitive purpose" is misplaced.

First, Petitioners cite *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1030 (2d Cir. 1979), for the principle that termination of a distributor is unlawful if "the manufacturer attempts to exact some collateral anticompetitive advantage." But *Fuchs* stands for no principle applicable here -- where only unilateral conduct is alleged -- because the quoted language is describing when "a [Sherman Act] § 1 conspiracy will arise." *Id.*[6] The "collateral anticompetitive advantage" addressed in *Fuchs* is present where a dealer is terminated to effectuate an unlawful exclusive dealing arrangement or other conspiracy in restraint of trade violative of § 1 of the Sherman Act, 15 U.S.C. § 1 (1994).

Like the *Fuchs dicta*, the vast majority of cases cited by Petitioners in their attempt to manufacture a split among the circuits involve distributors terminated pursuant to an unlawful § 1 conspiracy. *See DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir. 1993); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979); and *Hewlett Packard Co. v. Arch Assocs. Corp.*, 908 F. Supp. 265 (E.D. Pa. 1995). These

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[6] The full quotation reads, "A § 1 conspiracy will arise, however, where in addition to substituting one distribution system for another the manufacturer attempts to exact some collateral anticompetitive advantage." 602 F.2d at 1030.

cases stand only for the unremarkable proposition that a distributor terminated as part of an effort to enforce an illegal price fixing agreement (the *DeLong Equipment* case) or market allocation agreement (*Hewlett Packard* and *Engine Specialties*) is within the area of the economy threatened by the antitrust violation alleged. *See, e.g., McCready*, 457 U.S. at 479 ("Where the injury alleged is so integral an aspect of the *conspiracy* alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause.") (emphasis added and internal quotation and citation omitted). None of those cases are applicable here, where only unilateral conduct is involved. *See Sierra Wine & Liquor Co.,* 626 F.2d at 134 (finding no standing where distributor terminated after merger alleged the same "collateral anticompetitive purpose" as Petitioners here -- an alleged desire to monopolize the interbrand market).

Petitioners' heavy reliance on *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987) (Pet. at 21-23), is similarly misplaced because it involved a dealer termination in order to effectuate an exclusive dealing agreement violative of § 1. Although the plaintiff was a Hartz distributor, it was also independently a Hartz competitor in the interbrand market whom Hartz attempted to drive out of business. The Eighth Circuit found standing despite the fact that plaintiff was a distributor, not because of it. *Id.* at 803 ("[T]he jury could reasonably have found that Hartz's acts towards GI were . . . designed to destroy a perceived source of competition. That the source of this perceived competition was *also a distributor* of Hartz goods does not *insulate* Hartz's acts from the reach of the antitrust laws.") (emphasis added). Petitioners can find no support in *General Industries* because Florida Seed was not a competitor in the interbrand market allegedly monopolized.[7]

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[7] Petitioners citation of another Eighth Circuit case, *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991) (Pet. at 23), is of no

D. Monsanto's "Acquisition And Temporary Control Of A Competing Brand" Does Not Change The Analysis.

Finally, Petitioners assert that this case presents a question worthy of *certiorari* because Florida Seed's distribution contract was not renewed while Monsanto was in what Petitioners characterize as "temporary control" of the Kleenup brand. This "temporary control" of one of the two hundred products distributed by Florida Seed pending Monsanto's divestiture of the Kleenup brand pursuant to the FTC consent decree does not change the analysis.

"[A] well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975). There is no confusion regarding this principle in the lower courts. *See, e.g., Federal Trade Comm'n v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458, 463 (6th Cir. 1988); *Ambook Enters. v. Time, Inc.*, 612 F.2d 604, 612 n.14 (2d Cir. 1979) ("private plaintiffs cannot enforce government consent decrees"). If Monsanto had a "collateral anticompetitive purpose" to frustrate the FTC consent decree by refusing to renew Florida Seed's distributorship, only the

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assistance either because the *holding* of that case actually rejects Petitioners' position. The court there found no standing because the plaintiff, like Petitioners, was not complaining of injury it suffered as a customer or competitor of the defendant. *Id.* at 214. The language quoted from Professor Areeda's treatise (Pet. at 23) regarding standing granted to customers is similarly inapplicable because it does not address the standing of *former* customers who, like Petitioners, are complaining about the loss of their customer status, not injury they suffered as a customer.

FTC has standing to complain.[8] Petitioners cite no authority, and there is none, to the contrary.

Furthermore, if terminated distributors lack standing to challenge an allegedly anti-competitive upstream merger where no promise of a curative divestiture has been made, as held by every court to address the question, *supra* at 6-10, former distributors should fare no better as to standing where the acquirer has agreed to remedy any possible competitive concerns. Indeed, what Petitioners are claiming is that Monsanto rendered the promised divestiture ineffective, and that, despite the FTC consent order, this case is just like the uniform precedent in which distributors were held to lack standing.

II. THE ELEVENTH CIRCUIT'S "TARGET AREA TEST" TO DETERMINE WHETHER A PLAINTIFF IS AN EFFICIENT ENFORCER OF THE ANTITRUST LAWS IS IRRELEVANT.

The Eleventh Circuit denied Petitioners standing because they had not suffered antitrust injury; the court did not need to address whether Petitioners were efficient enforcers of the antitrust laws under that circuit's "target area" case law. Because, as described above, the Eleventh Circuit's holding regarding antitrust injury is clearly in accord with consistent precedent from this Court and the lower courts, the "target area test" used by the Eleventh Circuit to determine whether plaintiffs who have suffered antitrust injury are also efficient enforcers of the antitrust laws who should be granted standing is irrelevant here. Indeed, Petitioners can do no more than assert that "it is curious to note that the Eleventh

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[8] The FTC is fully capable of seeing that parties comply with consent decrees. *See, e.g.*, "Schnucks To Pay $3 Million, Divest Two Additional Stores To Settle FTC Charges Of Running Down Supermarkets Before Divesting" (FTC Press Release), 1997 WL 424944 (July 30, 1997) (describing penalty imposed on party to consent decree that failed to maintain the viability of assets to be divested).

Circuit still maintains its use of the 'target area test' which this Court expressly rejected in *Associated General*, 459 U.S. at 536 n.33." (Pet. at 25). Even if Petitioners were correct that this Court had rejected the target area test, which they are not,[9] "interesting to note" is *not* the test for this Court's discretionary exercise of *certiorari*. S.Ct. Rule 10.[10]

The Eleventh Circuit's conclusion that "if the injury the antitrust laws address -- the power to raise prices and reduce output -- has occurred, the proper parties to challenge Monsanto's acquisition of Ortho are direct purchasers in the non-selective herbicide market," (7a) is fully consistent with the prudential standing factors outlined in *Associated General Contractors*. Under *Associated General Contractors*, a plaintiff should show that it is claiming injury as a customer or competitor in the relevant market. 459 U.S. at 539. But Petitioners are not competitors in the interbrand market, and, while Petitioner Florida Seed is a *former* customer in the relevant market, its complaint relates not to injury as a customer (*i.e.* higher prices or reduced output) but the fact

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[9] *See Associated Gen.*, 459 U.S. at 536 n.33 (refusing to disown the target area test or the results based on them); *McCready*, 457 U.S. at 476 n.12 (case provides "no occasion . . . to evaluate the relative utility of any of these possibly conflicting approaches to the problem of remote antitrust injury."). *See generally* II Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 360 at 200 (rev. ed. 1995) ("[W]e do not fault the lower courts that . . . continue speaking of directness and target areas.").

[10] Petitioners' position in this Court is in stark contrast with its position below. In the Eleventh Circuit Petitioners noted that they "certainly do acknowledge, and have acknowledged (Appellant's Brief at 17), that this Court's target area test does not produce results substantially different from the multi-factor test espoused by the Supreme Court in [*Associated General Contractors*]." Reply Brief of Plaintiffs-Appellants at 22. *Cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

that it is no longer a customer. This is not the customer standing contemplated by this Court.

Finally, despite Petitioners' protestations, there is no "wrong without a remedy" here. If Monsanto has engaged in illegal monopolization which has allowed it to raise prices and decrease output, its remaining distributors -- who would be forced to pay the higher prices and who would suffer from lower sales if the increased prices were passed on to consumers -- would be injured and would have standing.[11] And, as noted, the FTC has standing to challenge any alleged violation of the consent decree.

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[11] Petitioners miscite *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. at 337, for the proposition that the remaining distributors will lack standing because they "stand to gain from any conspiracy to raise the market price." (Pet. at 28). The language they cite explains why the price-increaser's *competitors* lack standing. Monsanto's distributors, which are not its competitors, would be injured by price increases and *would* have standing.

CONCLUSION

Petitioners have failed to identify any true conflict between the decision of the Eleventh Circuit and the holding of any other court, including this Court. The petition raises no question worthy of *certiorari* and should be denied.

Respectfully submitted,

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September 9, 1997